

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2008-0069
)	DEPARTMENT B
v.)	<u>SUPPLEMENTAL</u>
)	<u>MEMORANDUM DECISION</u>
MARTIN ROCKY ACUNA,)	Not for Publication
)	Rule 111, Rules of
Appellant.)	the Supreme Court
_____)	

ON MOTION TO STAY APPEAL AND DISPOSITION FOLLOWING
SENTENCING CLARIFICATION BY TRIAL COURT

Cause No. CR-20072257

Honorable John S. Leonardo, Judge

MOTION DENIED; SENTENCES AFFIRMED

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ESPINOSA, Judge.

¶1 In this supplemental memorandum decision, we deny Martin Acuna’s motion to stay this appeal and we affirm his sentences for the reasons set forth below.

Background

¶2 Acuna was convicted of aggravated assault, attempted armed robbery, and attempted aggravated robbery. On appeal he has challenged the sentences imposed based on inconsistent statements the trial court had made during sentencing and in a related minute entry. In a memorandum decision, we first observed that Acuna had not objected to the sentences below and we noted that the prison terms “were all within the permissible respective statutory range, and therefore not illegal.” *State v. Acuna*, No. 2 CA-CR 2008-0069, ¶ 4, ¶ 7 (memorandum decision filed Nov. 26, 2008). However, in light of the inconsistencies in the record, we concluded “the most prudent course of action [was] to remand this case to the trial court for clarification.”

¶3 Upon remand, the trial court issued a “Response to Court of Appeals,” clarifying the sentences. The court specified that two 11.25-year prison terms were presumptive terms for non-dangerous, class three felonies with two historical prior felony convictions and the twelve-year sentence was an aggravated sentence for a non-dangerous, class four felony with two historical prior felony convictions. The trial court explained that it had misspoken at sentencing when it had referred to the twelve-year term as a “mitigated” one, adding that the minute entry, which characterized Acuna’s offenses as non-repetitive

and the 11.25-year terms as “aggravated” rather than presumptive, was incorrect. The length of each sentence remained the same.

¶4 Immediately after the trial court issued its clarification, Acuna filed a motion to reconsider our memorandum decision, arguing the remand for clarification had deprived him of appellate review of his claims, would not enable the trial court to correct errors or re-sentence him because the sentences would become final as soon as our mandate issued, and could result in “further sentencing-related errors from which [he] will have no statutory right to appeal.” Pursuant to this court’s order, the state filed its response to the motion, noting that in its answering briefs, the state had alternatively requested remand for clarification and that Acuna had not objected until after this court acknowledged in its memorandum that there did not appear to be any sentencing error and after the trial court had confirmed its intentions at sentencing.

¶5 In our ruling on Acuna’s motion to reconsider, we noted we had “tacitly suspended resolution” of the appeal in order for the trial court to clarify the record, thereby rendering moot Acuna’s request that this court stay the appeal and re-vest jurisdiction in the trial court. Because Acuna’s arguments on appeal all related to the inconsistencies in the record, which the trial court corrected on remand, we expressly granted Acuna leave to file a supplemental brief asserting any legal claims arising out of the trial court’s clarification. Acuna did not avail himself of this opportunity. Instead, he filed a motion to stay the appeal pending special action review by our supreme court. In that motion, he asserts this court’s

memorandum decision “could have no legal effect” and he is “uncertain of the status of the trial court’s clarification,” which he insists is not part of the record on appeal.

Discussion

¶6 In his motion to stay the appeal Acuna first suggests this court did not resolve his legal arguments on appeal, and by remanding the case for clarification, deprived him of his right to appellate review of his claims. This argument is meritless. On appeal, Acuna argued the trial court had fundamentally erred because conflicting statements in the record suggested it might not have intended to impose the sentences that were imposed, citing *State v. Cox*, 201 Ariz. 464, ¶¶ 11-14, 37 P.3d 437, 467-68 (App. 2002) (sentence within statutory range fundamental error when trial court erroneously sentenced defendant as parole violator, which eliminated possibility of mitigated sentence). In our memorandum decision, we made clear that the sentences appeared to be well within the applicable statutory parameters and did not appear to be illegal, but we deferred our fundamental error review in order to verify the trial court’s intentions. In light of the trial court’s clarification, it is clear that *Cox* is not applicable and there are no remaining legal issues to address. Acuna has impliedly conceded the point by failing to raise any issue in a supplemental brief as we invited him to do.

¶7 Acuna contends, however, citing generally to the definition of “memorandum decision,” that our decision to remand the case to the trial court was procedurally defective and would extinguish his appeal on the merits. This proposition is contrary to well-established Arizona law and practice. See *State v. Waltman*, 105 Ariz. 520, 522, 467 P.2d

914, 916 (1970) (defendant appealed result of the resentencing, supreme court referred to trial court's order as "a remand for the limited purpose of clarifying language"); *State v. Zamora*, No. 1 CA-CR 06-0894, ¶ 8, 2009 WL 130131 (Ariz. Ct. App. Jan. 20, 2009) (remanding case to trial court for clarification when record unclear); *State v. West*, 173 Ariz. 602, 845 P.2d 1097 (App. 1992) (involving appellate review after case was remanded for clarification); *State v. Bowles*, 173 Ariz. 214, 216, 841 P.2d 209, 211 (App. 1992) ("[W]hen there is a discrepancy between the oral pronouncement of sentence and the minute entry . . . a remand for clarification of sentence is appropriate.").

¶8 In his motion to stay the appeal, Acuna also asserts that the legal status of the trial court's clarification is "dubious" and "not part of the record on appeal in this matter," and therefore irrelevant to his "judgments and sentences entered on February 6, 2008." But as noted above, appellate courts routinely remand cases for clarification when necessary. Furthermore, in its clarification, the trial court did not make any new findings or modify the sentences imposed, but merely explained its inconsistent statements pursuant to the express direction of this court. *Cf. State v. Mann*, 188 Ariz. 220, 230, 934 P.2d 784, 794 (1997) (when trial court "merely explained the reasons" for its previous findings, hearing was not "critical stage" of proceedings requiring defendant's presence). And, if any harm could result from our reliance on this clarification, Acuna has waived it by declining our invitation to submit a supplemental brief addressing the matter. *See State v. Moody*, 208 Ariz. 424, n.9,

94 P.3d 1119, 1147 n.9 (2004) (general rule is party who fails to argue a claim abandons and waives it).

Conclusion

¶9 In its clarification, the trial court confirmed it intended to sentence Acuna to two presumptive, 11.25-year prison terms for class three, non-dangerous crimes committed with two historical prior felony convictions and to an aggravated sentence of twelve years for a non-dangerous, class four felony with two historical prior felony convictions. The court's clarification is amply supported by the record and, as all three sentences are within the applicable statutory ranges, they are not illegal and the trial court did not commit error in imposing them, much less fundamental error. We, therefore, affirm Acuna's sentences and deny his motion to stay the appeal.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge